

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
DANIEL B. SCHOWENGERDT,)	Case No. 02-15715
)	Chapter 7
)	
Debtor.)	
_____)	
)	
EDWARD J. NAZAR, Trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-5243
)	
DANIEL B. SCHOWENGERDT,)	
)	
)	
Defendant.)	
_____)	

**ORDER DENYING DEFENDANT’S MOTION
FOR JUDGMENT AND/OR TO DISMISS**

Defendant Daniel B. Schowengerdt (“Defendant”) seeks an order pursuant to Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(1) and (6) dismissing this adversary proceeding. Edward J. Nazar, Trustee, filed this adversary proceeding on July 31, 2003, seeking to deny Defendant’s discharge or, in the alternative, seeking to revoke Defendant’s discharge if the discharge had already been granted. Defendant contends that the Trustee’s failure to file this adversary within the 60-day period prescribed by Fed. R. Bankr. P. 4004(a) is fatal to maintenance of the complaint. Moreover, Defendant argues that the Trustee’s effort to obtain revocation of Defendant’s discharge is premature and unwarranted because Defendant has not yet been granted a discharge in the case. Defendant’s motion must be denied for the reasons set forth below.

Defendant filed his bankruptcy case on November 13, 2002. The last day on which to object to discharge was February 7, 2003. The Trustee did not seek an extension of this deadline. An unrelated adversary proceeding was filed on February 6, 2003 (“First Adversary”).¹ The First Adversary was resolved and closed on July 22, 2003. The Trustee filed the present adversary proceeding pursuant to 11 U.S.C. § 727 on July 31, 2003. No discharge has yet been issued in the bankruptcy case.

In the complaint, the Trustee seeks to deny Defendant a discharge because, according to the Trustee, Defendant converted post-petition rent and accounts receivable. Moreover, Trustee alleges that the Defendant violated several orders of this Court requiring Defendant to turn over to the Trustee certain financial information as well as tax refunds, rent rolls, and other business records. The Trustee’s complaint asserts that Defendant has concealed property of the estate from him in violation of § 727(a)(2) and that the Defendant has withheld from him books and records in violation of § 727(a)(4)(D). Trustee also requests, in the alternative, revocation of Defendant’s discharge under § 727(d).

Defendant, in turn, suggests that this Court lacks subject matter jurisdiction over the complaint because the Trustee filed it well after the 60-day period set forth in Fed. R. Bankr. P. 4004(a) had expired. In addition, he argues that any request for revocation of the discharge is premature in the absence of an actual discharge. The Trustee responds that he learned of the Defendant’s conduct after the expiration of the Rule 4004(a) deadline and that such conduct warrants revocation. Neither party filed memoranda of authority in support of their positions.

¹ *Renee S. Schowengerdt v. Daniel B. Schowengerdt*, Adv. No. 03-5058. In this adversary, plaintiff sought a determination that a property settlement award entered against defendant in connection with the parties’ divorce was nondischargeable under 11 U.S.C. § 523(a)(15).

While it has long been thought among bankruptcy practitioners that Rule 4004(a)'s 60-day deadline for general objections to discharge (like its counterpart in Rule 4007(c) concerning § 523(c) exceptions to discharge) is “jurisdictional,” a recent decision of the U.S. Supreme Court makes clear that it is not. In *Kontrick v. Ryan*,² a creditor opposed the debtor's discharge, but filed his complaint well after expiration of the 60 days. Only after judgment was entered for the creditor and a motion for reconsideration was filed did the debtor raise the expiration of the 60 days as a “jurisdictional” objection. Affirming the Seventh Circuit Court of Appeals, the Supreme Court held that only Congress may determine the jurisdiction of a lower federal court. Drawing on ample precedent holding that mere rules do not create or expand jurisdiction, the Court held that “the filing deadlines prescribed in Bankruptcy Rules 4004 and 9006(b)(3) are claim- processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate.”³ At the same time, the Court maintained that “a claim-processing rule . . . even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.”⁴ Such rules afford the debtor a defense to a complaint filed outside the time limits.

Thus, Defendant's assertions that the Court has lost jurisdiction of this proceeding because of the Trustee's late filed complaint are wrong. The Court has jurisdiction of the matter. That said, if the Trustee's complaint merely sought a denial of discharge, Defendant's dismissal motion would have significant merit because Defendant raised the timeliness issue well before the Court reached the merits of the objection. However, the Trustee also seeks to revoke Defendant's discharge.

² ___ U.S. ___, 124 S.Ct. 906 (2004).

³ 124 S.Ct. at 914.

⁴ *Id.* at 916.

Rule 4004(a) provides to creditors and parties in interest 60 days in which to contest the grant of a discharge under § 727(a). Rule 4004(c) contemplates that, upon expiration of the 60 days, the Court will issue the discharge. Thereafter, in accordance with the time periods set out in § 727(e), the trustee may seek revocation of the discharge if it has been obtained by fraud of the debtor not discovered until after the 60 days have run, the debtor has obtained and concealed estate property after the 60-day period, or the debtor has refused to obey a Court's lawful order per § 727(a)(6). In this district, it is rare that a discharge is entered immediately upon expiration of the 60 days; some gap in time between the discharge objection deadline and the actual discharge will almost always occur.

Rule 4004(c)(1)(B) provides that a discharge will not issue, even after the 60 days have run, when a complaint objecting to discharge has been filed. Courts have stated differing views of how "gap" objections like these should be handled. The Second and Ninth Circuits have held that where the 60 days have run, and even where the objecting party obtains information within the 60 days that would support a general objection to discharge, nothing prevents the use of such information as the basis for a revocation under § 727(d).⁵ Two bankruptcy cases from Arkansas have held that a strict reading of the Rules in conjunction with the statute requires the conclusion that, until a discharge has been issued, the trustee may not seek revocation and, if the information upon which the trustee bases her claims was obtained prior to the running of the 60 days, the trustee's revocation effort will be to

⁵ See *Citibank, N.A. v. Emery (In re Emery)*, 132 F.3d 892, 896 (2d Cir. 1998) ("[W]e do not believe that Congress intentionally drafted a statute to punish fraudulent conduct by debtors that at the same time provides a period of immunity for such debtors. We agree that the literal application of § 727(d) here cannot have been intended by Congress and the Supreme Court."); *Mitchell v. Dietz (In re Dietz)*, 914 F.2d 161, 164 (9th Cir. 1990) (Bankruptcy court's "deeming" of the discharge to have been entered so that it could be revoked is well within spirit of the Code).

no avail.⁶

There is no Tenth Circuit authority on the issue. Other courts have followed the logic of the Second and Ninth Circuits and permitted such objections to go forward. These views are best summarized by the court in *Walton v. Staub (In re Staub)*, where it stated:

The interpretation advanced by the Debtors affords persons committing fraud in their Chapter 7 case and in the procurement of their discharge a safe haven, the gap period described, to confess their sins, i.e. to disclose their fraud and avoid any consequence, a plainly unfair and inequitable result. When a discharge is not entered "forthwith" after the expiration of the FRBP 4004(a) period and until a discharge is actually entered, even though a complaint objecting to discharge under § 727(a) would not be timely, a party may properly file a complaint under § 727(d) to revoke the discharge for conduct occurring prior to the expiration of the FRBP 4004(a) period which the party did not discover in time to file a complaint under § 727(a). *England v. Stevens (In re Stevens)*, 107 B.R. 702 (9th Cir. BAP 1989). The administrative delay in the issuance of the discharge does not create a safe haven gap period where individuals procuring a bankruptcy discharge through fraud may avoid the consequence of their conduct.⁷

In short, debtors should not benefit from the happenstance that, for whatever reason, their discharge has not been entered by the time the trustee determines that wrongdoing sufficient to form a basis for a § 727(d) complaint has occurred. This Court could dismiss the instant adversary proceeding, allowing the discharge to issue and the Trustee to again seek revocation. Such a course would likely confuse the creditor body that would receive and rely upon notice of the discharge, but arguably not receive notice of the Trustee's action to revoke it. The Trustee's allegations are serious and warrant this Court's consideration on the merits. Equitable concerns, along with the integrity of

⁶ *Powell v. First National Bank of Nashville, Ark.*, 113 B.R. 512 (W.D. Ark. 1990) (Not for courts to rationalize the contrary results of Rule 4004 by utilizing equitable considerations to allow revocation of discharge); *Employers Mutual Casualty Co. v. Lazenby (In re Lazenby)*, 253 B.R. 536 (Bankr. E.D. Ark. 2000) (Amendment to original complaint not allowed as matter of course even where factual basis not discovered until after 60 day period had run).

⁷ 208 B.R. 602, 606-07 (Bankr. S.D. Ga. 1997).

the bankruptcy system, require that this Court permit the revocation proceeding to go forward.

Defendant's motion is therefore DENIED. The parties shall adhere to the Scheduling Minute Order entered in this case on December 4, 2003.⁸

Dated this 19th day of February, 2004.

ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

⁸ Dkt. 10.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Order Denying Defendant's Motion For Judgment And/Or To Dismiss** was deposited in the United States mail, postage prepaid on this 19th day of February, 2004, to the following:

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